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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 COYNES L. ENNIX JR., M.D.,

17 Plaintiff,

18 vs.

19 ALTA BATES SUMMIT MEDICAL
20 CENTER,

Defendants.

Case No. C 07-2486 WHA

**PLAINTIFF'S MOTION IN LIMINE
NO. 5 TO EXCLUDE TESTIMONY
OF JAMES LOVIN AND BRIAN
HITE, M.D.; DECLARATION OF
RACHEL SATER**

Trial Date: June 2, 2008
Dept: Ctrm. 9, 19th Floor
Judge: Hon. William H. Alsup

21 Plaintiff Coyness L. Ennix, Jr. ("Dr. Ennix") moves to exclude specified testimony of
22 James Lovin and Brian Hite, M.D. ABSMC designated Mr. Lovin and Dr. Hite to testify
23 regarding information they provided in the challenged peer review process, and Dr. Ennix does
24 not object to such testimony. Rather, Dr. Ennix moves to exclude any testimony other than the
25 opinions or evidence that Lovin or Hite provided to ABSMC during the peer review, as such
26 additional testimony would not have been considered by ABSMC and therefore would have no
27 probative value regarding ABSMC's motivation or the veracity of its proffered justification of

1 protecting “patient safety.” If such testimony has any probative value, it is outweighed by the
 2 potential for prejudice, confusion, and waste of time.

3 Therefore, the Court should exclude all testimony of Dr. Hite and Mr. Lovin other than
 4 the testimony that each furnished during the peer review at issue.

5 **STATEMENT OF FACTS**

6 Dr. Ennix claims that ABSMC discriminated against him based on his race in violation of
 7 42 U.S.C. § 1981 in a peer review process conducted at the Summit campus. In its initial
 8 disclosures, ABSMC stated that it would call Mr. Lovin (a surgical technician) and Dr. Hite as
 9 witness, asserting that each has “knowledge he has provided to the peer review process,
 10 including during his interview” with the AHC and the MEC, respectively. (See Sater Decl., ¶ 2,
 11 Exhibit A, at 7:21-28.)

12 **ARGUMENT**

13 The sole issue in this case is whether race was a factor in ABSMC’s peer review actions
 14 against Dr. Ennix that nearly ruined his career as a cardiac surgeon. This Court should exclude
 15 testimony by Lovin and Hite, other than testifying as to their testimony before the AMC and
 16 MEC, respectively. Evidence is admissible if it is probative as to a “fact of consequence” and its
 17 probative value is not “outweighed by the danger of unfair prejudice, confusion of the issues, or
 18 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation
 19 of cumulative evidence.” FRE Rules 401, 403. Opinions or evidence not considered by
 20 ABSMC have no probative value regarding whether ABSMC’s actions regarding the current
 21 peer review were justified by patient care concerns or were motivated by racial animus. On that
 22 basis, Dr. Hite’s and Mr. Lovin’s testimony should be excluded except regarding their testimony
 23 to ABSMC during the peer review.

24 Finally, even if Lovin’s and Hite’s testimony, not delivered to ABSMC, had any
 25 probative value in this case, such minimal value would be outweighed by its potential for unfair
 26 prejudice and confusion of the jury, which might mistakenly believe ABSMC had considered
 27 such testimony in the course of its peer review, when in fact it did not. Further, presentation of
 28

1 this extraneous evidence would unnecessarily waste time and delay conclusion of this case. For
2 these additional reasons, this Court should exclude such evidence.

3 CONCLUSION

4 For the foregoing reasons, Dr. Ennix respectfully requests that the Court exclude the
5 testimony of Dr. Hite and Mr. Lovin other than regarding their testimony to the MEC and AHC,
6 respectively, during the challenged peer review.

7 Respectfully submitted,

8 Dated: April 29, 2008

MOSCONE, EMBLIDGE & QUADRA, LLP

11 By: _____ /s/
12 Rachel J. Sater

13 Attorneys for Plaintiff

15 DECLARATION OF RACHEL J. SATER

16 I, Rachel J. Sater, declare:

17 1. I am an attorney licensed to practice law in the State of California and in this
18 Court. I am an attorney at Moscone, Emblidge & Quadra, LLP, counsel of record for the
19 Plaintiff.

20 2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of
21 ABSMC's initial disclosures in this case.

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct to the best of my knowledge.

26 Dated: April 29, 2008

_____ /s/
Rachel J. Sater

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19 ALTA BATES SUMMIT MEDICAL CENTER

20 UNITED STATES DISTRICT COURT

21 NORTHERN DISTRICT OF CALIFORNIA

22 COYNES L. ENNIX, JR., M.D.,

23 Plaintiff,

24 v.

25 ALTA BATES SUMMIT MEDICAL CENTER,

26 Defendant.

27 CASE NO. C 07-2486 WHA

28 **DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION IN LIMINE
NO. 5 TO EXCLUDE TESTIMONY
OF JAMES LOVIN AND BRIAN
HITE, M.D.**

DATE: May 19, 2008

TIME: 2:00 p.m.

DEPT: Ctrm. 9, 19th Floor

JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007

TRIAL DATE: June 2, 2008

1 I. INTRODUCTION

2 Defendant Alta Bates Summit Medical Center ("ABSMC" or "the Hospital"),
 3 hereby submits this opposition to Plaintiff Coyness L. Ennix's ("Plaintiff's") Motion in
 4 Limine No. 5 to Exclude Testimony of James Lovin and Brian Hite, M.D.

5 Plaintiff concedes that Mr. Lovin and Dr. Hite are relevant witnesses to this
 6 action and does not challenge any testimony or evidence they intend to provide
 7 concerning the information furnished to ABSMC by them in the peer review process.
 8 Plaintiff, however, seeks to exclude any other testimony offered by them, which would
 9 not have been considered by ABSMC because it allegedly would have "no probative
 10 value as to ABSMC's motivation or veracity of its proffered justification of protecting
 11 'patient safety.'" Plaintiff's narrow reasoning is flawed as Mr. Lovin and Dr. Hite's
 12 anticipated testimony is relevant to other factual issues put forth by Plaintiff as well as
 13 ABSMC's defense in this case. Therefore, such testimony must be admissible at trial.

14 II. ANTICIPATED TESTIMONY

15 ABSMC has identified the scope of the anticipated testimony of Mr. Lovin
 16 and Dr. Hite in its Witness List. It does not appear that Plaintiff has any objection to the
 17 testimony of Mr. Lovin and Dr. Hite as to their participation in the peer review process
 18 concerning Plaintiff, which includes their discussions with the Ad Hoc Committee and/or
 19 Medical Staff Officers. Rather, Plaintiff challenges any other testimony they may offer.
 20 This would presumably include Mr. Lovin and Dr. Hite's knowledge and observations on
 21 which their discussions with ABSMC were based, Dr. Hite's knowledge of Plaintiff's
 22 reputation for patient care; and Mr. Lovin's continuing concern regarding Plaintiff's skill
 23 and attentiveness as reported to ABSMC.

24 III. ARGUMENT

25 The Federal Rules of Evidence provide that relevant evidence is
 26 admissible at trial. Pursuant to Rule 401 states that relevant evidence is defined as "
 27 evidence having any tendency to make the existence of any fact that is of consequence

1 to the determination of the action more probable or less probable than it would be
 2 without the evidence. See also *U.S. v. Boulware*, 384 F. 3d 794, 805 (9th Cir. 2004).

3 **A. The Anticipated Testimony of Mr. Lovin and Dr. Hite Is Relevant.**

4 Plaintiff concedes that Mr. Lovin and Dr. Hite provided information
 5 including opinions or evidence to ABSMC during Plaintiff's peer review. Plaintiff's motion
 6 in limine, however, is based on the faulty premise that only the actual opinions or
 7 evidence offered during the peer review is relevant in this action.

8 Plaintiff seeks to remove from the jury's consideration information that is
 9 relevant to the central issues of this case. Inherent in the opinions offered by Mr. Lovin
 10 and Dr. Hite to ABSMC is their personal interactions and observations of Plaintiff, which
 11 is proper witness testimony under Rule 701.¹ Such testimony will further assist with
 12 providing a "clear understanding of testimony." Both Mr. Lovin and Dr. Hite will
 13 demonstrate how and why they were in a position to contribute information to ABSMC
 14 during the peer review process.² Plaintiff cannot establish how such testimony is beyond
 15 the scope of permissible testimony.

16 The anticipated testimony Dr. Hite is also relevant to another factual issue
 17 presented by this case, Plaintiff's reputation for patient care. Such testimony is relevant
 18 as Plaintiff has put his reputation squarely at issue in this case.³ Thus, Plaintiff cannot

20 ¹ Opinion Testimony By Lay Witnesses. If the witness is not testifying as an expert, the
 21 witness' testimony in the form of opinions or inferences is limited to those opinions or
 22 inferences which are (a) rationally based on the perception of the witness, and (b)
 23 helpful to a clear understanding of the witness' testimony or the determination of a fact in
 24 issue, and (c) not based on scientific, technical, or other specialized knowledge within
 25 the scope of Rule 702. Fed. R. Evid. 701.

26 ² For example, Dr. Hite intends to testify as to his personal knowledge of Plaintiff's
 27 practice as well as the preparations made by him and other OR team members made
 28 before commencing minimally invasive valve procedures. Testimony directly relevant to
 the opinions and evidence he provided to ABSMC.

29 ³ In the Complaint, Plaintiff surmises that "[t]his case arises out of the concerted effort of
 30 medical doctors ... and Alta Bates Summit Medical Center ("Alta Bates Summit") to
 31 destroy the career of Plaintiff Coyness L. Ennix Jr., M.D. ("Plaintiff or "Dr. Ennix"), a
 32 highly experienced and accomplished African American cardiac surgeon." (Compl.,
 33 1:25-2:1.) From the inception of this action and to date, Plaintiff attributes the acts by
 34 ABSM have resulted in the "devastating damage" to his reputation (2:14-15, 3:4-6, see
 35 also Plaintiff's Deposition, 10:14-15:21; Plaintiff's Expert Report of Jed Greene, CPA,
 36 CMA, pp. 7-8, ¶¶ 27-28.)

1 deny the introduction of such relevant evidence. *Lloyd v. Conseco Finance Corp.*, 2001
 2 WL 36097624 *7 (C.D. Cal. Oct. 19, 2001) (defendants' expert opinion as to average
 3 length of time individuals in plaintiff's position employed with defendant relevant to rebut
 4 damages); *Gotthardt v. National Railroad Passenger Corp.*, 191 F. 3d 1148, 1158 (9th
 5 Cir.1999) (plaintiff unable to show that her lost work could be attributed to defendant's
 6 unlawful conduct).

7 The information relevant to the jury's determination of whether ABSMC
 8 was motivated by racial discrimination goes beyond the narrow scope urged by Plaintiff.
 9 It includes all information available to the decision makers regarding Plaintiff, including
 10 the personal knowledge and observations which founded the opinions offered by Mr.
 11 Lovin and Dr. Hite. Such information is relevant to the jury's evaluation of ABSMC's
 12 intent.

13 B. **The Anticipated Testimony of Mr. Lovin and Dr. Hite is Not More
 Prejudicial Than Probative.**

14 Plaintiff asserts that the testimony of Mr. Lovin and Dr. Hite should be
 15 excluded because its probative value is substantially outweighed by the potential
 16 prejudicial impact on the jury. This assertion is unsupported by the facts and should be
 17 rejected by this Court. Rule 403 provides:

18 Although relevant, evidence may be excluded if its probative
 19 value is substantially outweighed by the danger of unfair
 20 prejudice, confusion of the issues, or misleading the jury, or
 21 by considerations of undue delay, waste of time, or needless
 22 presentation of cumulative evidence.

23 Fed. R. Evid. 403. District courts are accorded great latitude in determining whether the
 24 prejudicial effect of evidence outweighs its probative value. *Trevino v. Gates* (9th Cir.
 25 1996) 99 F.3d 911, 922.

26 Plaintiff's sole argument in support the contention that the probative value
 27 of the testimony of Mr. Lovin and Dr. Hite is substantially outweighed by prejudice, is that
 28 the jury might "mistakenly believe ABSMC had considered such testimony in the course
 of its peer review, which in fact it did not." Plaintiff's expressed concern is without merit.

1 Both Mr. Lovin and Dr. Hite provided information that was considered by ABSMC in the
 2 peer review process. Any potential prejudice does not outweigh the relevance of their
 3 testimony. Instructions can be provided to the jury to remedy Plaintiff's concerns rather
 4 than the preclusion of the testimony, which will assist the jury in its evaluation of whether
 5 the Hospital acted based on racial animus.

6 **IV. CONCLUSION**

7 For each of the foregoing reasons, Defendant ABSMC respectfully
 8 requests that the Court deny Plaintiff's Motion in Limine No. 5, which seeks to prevent
 9 the introduction to exclude the testimony of Mr. Lovin and Dr. Hite in its entirety. The
 10 anticipated testimony of Mr. Lovin and Dr. Hite should be admitted.

11 DATED: May 9, 2008 KAUFF MCCLAIN & MCGUIRE LLP
 12

13 By: 
 14 ALEX HERNAEZ

15 Attorneys for Defendant
 16 ALTA BATES SUMMIT MEDICAL
 17 CENTER

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